SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 515.

GEORGE W. CROSSMAN ET AL., APPELLANTS,

vs.

UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

On the 26th day of April, 1900, the appellants, George W. Crossman *et al.*, constituting the firm of W. H. Crossman & Bro., merchants, of the city of New York, made entry for consumption at the custom-house, in the city of New York, of certain merchandise (Record, fol. 8). The merchandise consisted of certain whiskey, brandy, and jam (fol. 9). The articles had been brought from the Hawaiian Islands. They were assessed for duty by the collector of the port of New York under the appropriate provisions for the articles respectively in the tariff act of July 24, 1897, commonly known as the Dingley tariff act. It is conceded by the appellants that if the articles were dutiable under said act at all, the provisions selected by the collector were the proper ones, and therefore no disputed question of classification under conflicting provisions of the Dingley Act arises in this case.

Against the action of the collector in assessing any duties whatever upon this importation the importers duly protested. Their protest appears in the record (fols. 9 and 10). Stripped of formal verbiage, it claimed that the Hawaiian Islands, whence these goods had been brought, were a part of the United States, and that therefore no duty could be lawfully assessed upon goods brought from the islands to New York; that the islands had been annexed and made part of the territory of the United States by joint resolution of Congress of July 7th, 1898 (30 U. S. Stat. at Large, 750); that so much of said joint resolution as provided that "until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged" was unconstitutional and void as being in conflict with the provision of subdivision 1, section 8, article 1 of the Constitution of the United States that "all duties, imposts, and excises shall be uniform throughout the United States," and also with subdivision 5, section 9, article 1 of the Constitution of the United States that "no tax or duty shall be laid on articles exported from any State."

The Board of United States General Appraisers, to whom the collector transmitted the protest, in pursuance of section 14 of the customs administrative act of June 10, 1890, overruled the same. Substantially, they held that the question involved was one of great moment,

not free from doubt, which would ultimately have to be decided by this court, and that they were following a well-settled practice in deciding any doubts in favor of the constitutionality of the statute. Their opinion appears in the record (folios 13 to 16).

The importers filed a petition for a review in the United States circuit court for the southern district of New York, in pursuance of section 15 of the customs administrative act (fols. 1 to 3).

The Board of Appraisers thereupon transmitted the record to said court, which, after hearing argument, affirmed the action of the board. The opinion of the court appears at folios 17 to 20. Substantially, the learned judge (Townsend) took the same position as the Board of General Appraisers—that this court would pass upon all the questions, and that in the meantime doubts as to the constitutionality of the law should be resolved in favor of its validity.

A judgment, decree, or decision was entered upon this opinion (fol. 22), and an appeal allowed by the circuit court (fol. 23), which appeal now comes before this court for argument and decision.

PROVISIONS OF LAW TO BE CONSIDERED.

The joint resolution annexing the Hawaiian Islands is as follows:

"Whereas the Government of the Republic of Hawaii having in due form signified its consent, in the manner provided for by its constitution, to *cede absolutely and without reserve* to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings, or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and *they are hereby, annexed as a part of the territory of the United States* and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, *except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States*, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President

shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States custom laws and regulations to the Hawaiian Islands *the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.*

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That *the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated*, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7, 1898."

The Dingley tariff act under which the duties were assessed begins with the following enacting clause:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That on and after the passage of this act, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon *all articles imported from foreign countries*, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely."

CONTENTIONS OF APPELLANTS.

The appellants rely on the following propositions:

1. At the time of the importation of these goods the Hawaiian Islands, having been, by the action of Congress approved by the President, annexed as part of the territory of the United States, were not a foreign country within any sense of that term, and certainly not within the sense of that term as used in the enacting clause of the Dingley Tariff Act.

2. The action of Congress in providing in the joint resolution of annexation that the customs relations of the Hawaiian Islands with the United States and with other countries should remain unchanged until Congress should further legislate on the subject was a violation of the provision of the Constitution that "all duties, imposts, and excises shall be uniform throughout the United States."

3. As such joint resolution provided for the collection at the ports of the Hawaiian Islands of duties upon articles sent thither from other ports of the United States, this was, in effect, a violation of the provision of section 9 of the Constitution, that "no tax or duty shall be laid on articles exported from any State."

DIFFERENCE BETWEEN THIS CASE AND OTHERS NOW BEFORE THE COURT.

The cases recently argued before the court, and others about to be argued, and this case all involve in a general way the question of the status of the newly acquired territory under the Constitution of the United States and the extent to which the people in such newly acquired territory become clothed by the fact of annexation with the immunities and privileges of citizens of the United States. But there are certain features in which this case differs widely from the cases heretofore argued, and some points in which it differs from any of those not yet argued before the court. And it is deemed important at the outset to call attention to these points of difference, as the result may be to simplify and abbreviate the argument. Attention is therefore invited to the following points:

I. There is no question involved in this case as to the force and effect of a treaty or the interpretation of a treaty. These islands were not annexed by treaty. A treaty was pending before the Senate at the time of the annexation, but had not been ratified, presumably because the necessary two-third vote could not be obtained for that purpose. As annexation by joint resolution could be carried by a majority vote in each House, that form of annexation was adopted. The Government of the Republic of Hawaii had ceded all rights of sovereignty absolutely and without reserve to the United States of America and the Congress of the United States had accepted, ratified, and confirmed said cession. These cases therefore differ absolutely from the Goetze and Pepke cases in that there had been at the time of the importations in those cases no legislation with reference to the status of Porto Rico or the Philippines by Congress (indeed, there has been none yet as regards the Philippine Islands).

II. There is no question in this case, as there has been in other cases, of military government. The Hawaiian Islands were never under military government after their annexation to the United States. The cession was peaceful and unquestioned. The existing civil government was continued in operation and, therefore, none of the principles

of public or international law, which can be invoked as to conquered or ceded territory temporarily under military government, can be invoked in this case.

III. This case differs from other cases in the fact that Congress, legislating for the annexation of these islands, in plain and unqualified language provided that they were annexed "as a part of the territory of the United States." There was no language about their being a dependency of the United States—a country or a people under the protection of the United States. The plain language used was that they were a part of the territory of the United States; and it would seem that no more startling proposition could be enunciated than that a place thus made a part of the territory of the United States should be treated as a foreign country for purposes of taxation under a statute passed a year before the annexation imposing duties on goods imported from foreign countries.

ARGUMENT.

I.

After annexation the Hawaiian Islands were a part of the United States within the meaning of the phrase "throughout the United States" in the provision of the Constitution requiring uniformity in taxation.

There has been a vast mass of discussion as to the various senses in which the words "United States" are used in various parts of the Constitution. The words are doubtless used in some places to mean the States united, and in other places to refer to the Government, and it would be hardly profitable, though perhaps interesting, to consider each clause in which the words are used. We submit with deference that there are five places in the Constitution in which the words "the United States" are used with a preceding preposition, such as "in" or "throughout," to designate place, or in a geographical sense. Those five places are the following:

Article 1, section 8, subdivision 1. "All duties imposts, and excises shall be uniform throughout the United States."

Id., subdivision 4. "To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

Article 2, section 1, subdivision 3. "The Congress may determine the time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States."

Thirteenth amendment. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States."

Fourteenth amendment. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

In each of these five places, with one exception, the words "in" or "throughout" the United States are intended to include the Territories as well as the States. The exception is the provision for the day of choosing Presidential electors. This does not, of course, apply to the Territories, because they are not permitted to participate in the election of a President. The words "throughout the United States,"

in the provision for uniform naturalization and bankrupt laws, have been uniformly applied to the Territories as well as the States. Naturalization laws passed in 1802 provided (section 2165, Revised Statutes) that an alien might be admitted to become a citizen by declaring on oath "before a circuit or district court of the United States, or a district or supreme court of the Territories, etc., his intention to become a citizen, and that he should make it to appear that he had resided within the United States five years at least, and within the State or Territory where said court was held for at least one year, etc. The bankruptcy laws have been made by Congress to apply in the District of Columbia and the Territories as well as in the States. (See sects. 1 and 16 of the bankruptcy act of Aug. 19, 1841, 5 U. S. Stats. at Large; 440, bankrupt act of 1867, sects. 4977 and 4978, Rev. Stat., and sects. 1 and 2 of the bankrupt act of 1898, 30 U. S. Stats. at Large, 544.)

The words "within the United States" in the thirteenth amendment undoubtedly include the Territories. The claim on the part of the Government that the Territories would not be covered by said amendment were it not for the concluding phrase, "or any place subject to their jurisdiction," will be considered more in detail hereafter.

In the fourteenth amendment the words "in the United States," following the words "all persons born or naturalized," relate to the States and Territories and District of Columbia. This was expressly held by this court in the *Slaughterhouse Cases* (16 Wall., 36), where this court said:

> "It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. * * *
>
> "To remove this difficulty primarily and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States and also citizenship of a State, the first clause of the first section was framed.
>
> "The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of difference of opinion. * * * Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

It would be a strange view of language to hold that the words "throughout the United States" in article 1, section 8, were narrower or more limited in their scope than the words "in the United States" in the fourteenth amendment. There is no principle of grammar, logic, law, or common sense on which the words "throughout the United States" in the uniformity clause with regard to taxation can be restricted to the States, excluding the Territories.

II.

The words "or any place subject to their jurisdiction" were not inserted in the thirteenth amendment to cover the Territories of the United States and to indicate any recognition that the words "within the United States" did not include the Territories.

In considering the meaning of these words in the thirteenth amendment we must keep in view the situation of the country at the time of the adoption of this amendment and the history of its enactment, and it seems a little unfortunate that the immense research which has been displayed on the other side of this case in finding out the opinions of Mr. Jefferson and other founders of the Union had not been directed to this branch of our history. At the time of the passage of this amendment through Congress, where its language was selected, some ten States of the Union had seceded, organized a Confederate government, and were making war upon the Union, of which the Congress sitting at Washington was a part. Not only did these seceding States consider themselves out of the Union, but many of those in the North who were supporting the Union Government took the position that, while these seceding States were properly subject to the jurisdiction of the United States and must be compelled by war and conquest to submit to such jurisdiction, they were, nevertheless, not parts of the United States; that they had gone out of the Union and had not been taken back. The question whether the Confederate States had been out of the Union since the date of their secession or had always been in the Union was a question concerning which there was very active controversy among public men in and out of Congress. (See Cong. Globe, 38th Cong., 1st sess., part 2.) This dispute was referred to by Mr. Lincoln in the last public speech he ever made, from which we quote the following:

> "I have been shown what is supposed to be an able letter in which the writer expressed regret that my mind has not seemed to be definitely fixed upon the question whether the seceded States, so called, are in the Union or out of it. It would perhaps add astonishment to his regret to learn that as it appears to me that question has not been and is not a practical or material one, and that any discussion of it could have no effect other than the mischievous one of dividing friends. As yet, whatever it may become, the question is put as the basis of a controversy—a merely pernicious abstraction. We all agree that the seceded States, so called, are out of their proper practical relation with the Union, and that the sole object of the Government is to get them back into their proper practical relation. I believe it is easier to do this without deciding or even considering whether those States have ever been out of the Union. The States finding themselves once more at home, it would seem immaterial to me to inquire whether they had ever been abroad."

It was in this situation of affairs that the thirteenth amendment was brought forward. The form proposed by Mr. Sumner in the Senate on February 7th, 1864, was "Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."

A few days later Mr. Lyman Trumbull, chairman of the Judiciary Committee, reported back as a substitute the amendment in its present form.

It is a most far-fetched assumption to say that the concluding words of the first section of the amendment were inserted because without them slavery would not have been prohibited in the Territories. They were clearly inserted for the purpose of avoiding all question as to whether the States in rebellion were within the United States. It was not by any means intended to concede that they were not within the United States, but it was intended to prevent any question being made about it. The words were also necessary and proper to cover places, such as ambassadorial residences, coaling stations, etc., outside the United States and under their jurisdiction by virtue of the principle of extraterritoriality.

It will be remembered that there was considerable discussion of the question after the amendment had been passed by Congress, whether the ratification of three-fourths of the States not in secession would be sufficient for its adoption. As the amendment did not pass the House of Representatives until the 31st of January, 1865, and the war closed shortly thereafter, it ultimately received the ratification of the seceding States as well as the others.

It seems that the advocates of the omnipotence of Congress with reference to the Territories are pressed very hard for arguments in support of their position when they find it necessary to resort to narrow rules of statutory construction for the purpose of giving an utterly false significance to this phrase in the thirteenth amendment of the Constitution.

III.

The doctrine that the limitations of the Constitution on the powers of Congress do not become operative in Territories of the United States until introduced into them by act of Congress is one utterly repugnant to the whole spirit of the Constitution and the theory of our Government, and fraught with mischief and danger.

A long line of decisions by this court that certain fundamental limitations upon the power of Congress contained in the Constitution are in force in various Territories of the United States are disposed of by those on the other side of this controversy by the statement that the Constitution operates in these Territories because Congress has seen fit to extend it to them by its own act. In other words, they advance the doctrine that the Constitution has no force or operation in any Territory until Congress puts it there, and of course this logically implies that it only extends there to the extent to which Congress puts it there, and can remain there only so long as Congress chooses to permit. In other words, those who hold that Congress puts the Constitution into the Territories can not escape from maintaining that Congress has power at any time to take the Constitution out of the Territories. If the Constitution operates to-day in Arizona, New Mexico, or Oklahoma only because Congress has chosen to extend it to those Territories, it must be within the power of Congress to-morrow to enact that the Constitution shall no longer be operative in any of its parts in these Territories. Indeed, it is a question whether Congress would need even to go through that form. A special subsequent

statute repugnant to a prior general statute obviously repeals the latter (The Cherokee Tobacco Case, 11 Wall., 616), and therefore, according to those who are opposed to us in this case, Congress must have a right to-morrow to create an order of nobility in Oklahoma or to pass a bill of attainder in Arizona or to provide that conviction in New Mexico shall work corruption of blood. The gentlemen on the other side may shrink from committing themselves to these extraordinary propositions, but they can show no sound reason why these propositions are not true if the general proposition for which they are contending is correct. It is not sufficient to say that some of the rights enjoyed by people in the Territories of Arizona and New Mexico were guaranteed by the treaties under which they were originally acquired. A treaty is nothing but a law, and Congress has a right by statute to do things which are inconsistent with treaties. Indeed, they have repeatedly done so, and this court has held that the only person who could complain of such act on their part was the Government with which the treaty had been made (Whitney *vs.* Robertson, 124 U. S., 190), and it is not at all likely that the Governments from which we acquired these Territories many years ago would concern themselves about any legislation of Congress at the present time which should be in effect a breach of some of the provisions of the treaty.

IV.

The Hawaiian Islands were not at the time of the importation in this case a foreign country in any sense, and certainly not in the sense in which the term foreign countries is used in the Dingley Act.

Many cases have been cited on behalf of the Government, wherein it has been held that countries captured in war or ceded by treaty of peace, while not foreign in an international sense, were to be treated as foreign within the sense of the laws of the conquered country until their status had been defined by legislative action in the country to which they were transferred. It is difficult to see how any of these authorities help the contention of the Government in this particular case. These islands were not conquered—they were not ceded by treaty. They were annexed by a legislative act of the Congress of the United States. Upon what authority can they be held, after Congress has by joint resolution annexed them as a part of the territory of the United States, to be a country foreign to the United States? It is true Congress had not so fully and completely legislated with reference to the islands as it might and did do thereafter, but it had certainly legislated enough to make them cease to be foreign. It had not only annexed them as a part of the territory of the United States, but it had provided that the revenue from or proceeds of the public lands thereof might be used for the civil, military, or naval purposes of the United States. It had authorized the President to vest the civil and judicial powers in such persons, to be exercised in such manner as he might direct. It had, in effect, repealed so much of the municipal legislation of said islands as was contrary to the Constitution of the United States. It had prohibited Chinese from coming from the islands to the United States, and it had appropriated out of the Treasury of the United States a hundred thousand dollars to carry out the

provisions of the joint resolution. Is it to be said for one minute that all these things were done with reference to a foreign country? Let those who maintain the other side of this controversy point out a single instance in the history of the United States, either before the Hawaiian annexation or since, in which Congress has annexed a place as a part of the territory of the United States, and yet treated it as a foreign country.

If the meaning of this language is as claimed by our opponents, why should the words "annexed as a part of the territory of the United States" have been used at all? Why would it not have been sufficient to say that "said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, made subject to the sovereign dominion of the United States?"

In his brief in the Goetze and Pepke cases, the Attorney-General says at page 5:

> "The Government contends that the term 'foreign countries' in the act of 1897 is to be regarded as having been understood by Congress to be subject to the rule of interpretation of the phrase given by the Supreme Court in the case of *Fleming* v. *Page*, where it was held that under our revenue laws every port is regarded as a foreign one until expressly established as domestic under the authority and control of the statutes of the United States."

Here we have the executive branch of the Government asking the judicial branch of the Government to hold that the legislative branch of the Government in using the words "foreign countries" in the Dingley tariff act must have meant them to apply to every country as to which Congress had not by legislation created therein collection districts and ports of entry.

It would seem that before asking this court to thus interpret the term "foreign countries" the executive department might at least adopt and be governed by the definition which it urges for the adoption of the court. Has it done so? Let us see. The act providing civil government for Porto Rico passed April 12, 1900, was made to go into effect on the 1st day of May of that year. On the 17th of April, 1900, we find the Treasury Department issuing the following (T. D. 22157):

> "The Department is of opinion that Porto Rico is not a foreign country within the meaning of the drawback law, and that, therefore, no refund of duty can be allowed by way of drawback on goods exported to Porto Rico."

Now, what was the drawback law? It was nothing more or less than section 30 of this same Dingley tariff act which provided that:

> "Where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the material used, less 1 per centum of such duties."

Now, Porto Rico was certainly one of the countries that was a foreign country in 1897, when the drawback law was passed, and the Treasury Department held that it was not in April, 1900, a foreign country

within the meaning of that law, and what we would like to be informed is if Porto Rico was not, in April, 1900, a foreign country within the meaning of section 30 of the Dingley Act, why were the Hawaiian Islands at the same time a foreign country within the meaning of the enacting clause of said act, notwithstanding they had been, as Porto Rico had not, in express terms by act of Congress annexed as a part of the territory of the United States?

It has already been pointed out in this controversy that the ground on which *Fleming* v. *Page* was decided was that "the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varing incidents of war or be enlarged or diminished as the armies on either side advanced or retreated." The further suggestion that "every port is regarded as a foreign one unless the custom-house from which the vessel clears is within a collection district established by act of Congress" was purely a dictum based on a misapprehension as to departmental usage, and subsequently overruled by this court (with the concurrence of the Chief Justice, who wrote the opinion in *Fleming* v. *Page*), in *Cross* v. *Harrison* (16 How., 164).

Consider for a moment the extent to which this doctrine would lead us if carried to its logical conclusions. Collection districts and ports have been established in various parts of the United States by act of Congress. An act by Congress may be at any time repealed by another act of Congress. If Congress should repeal the laws making places in New York, Maryland, Oregon, or California collection districts and ports of entry, would these States thereby become foreign countries within the meaning of our revenue laws? The Attorney-General will hardly contend for this proposition; but if not, how can the character of our territory, in respect of its being foreign or domestic, be made to depend solely upon the act of Congress in creating or abolishing collection districts or ports of entry.

In the recent act creating a Territorial government for the Hawaiian Islands it is provided in section 88 that the Territory of Hawaii shall comprise the customs district of the United States with ports of entry and delivery at Honolulu, Hilo, Mahukana, and Kahului. Suppose by a careless rider in an appropriation bill or otherwise this section should be inadvertently repealed, would the Hawaiian Islands thereby become foreign countries for revenue purposes, so that it would be immediately the duty of the Treasury Department to begin taking duties under the Dingley tariff on all articles that come from those islands? This is the logic of the claim as to *Fleming* v. *Page*, and it seems very clear that a doctrine that would lead to such consequences can not be sound, and we are entirely justified in asking the court to apply to it the language it used in the case of Genesee Chief, 12 How., 443:

> "We are convinced that if we follow it, we follow an erroneous decision into which the court fell when the great importance of the question, as it now presents itself, could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it, etc."

V.

The uniformity clause of the Constitution, with reference to indirect taxes, is one of the fundamental limitations upon the powers of Congress.

Very few of those who deny the proposition that the Constitution has force in the Territories of the United States without affirmative action on the part of Congress extending it to them go to the extent of claiming that Congress is subject to no limitations whatever in legislating for the Territories. Even the Attorney-General in his brief in the Goetze cases gives some illustrations (page 12 of his brief) of what he concedes would be instances of despotic power, which no Congress would claim, much less attempt to exercise. But the question is, What are the limitations upon the powers of Congress? Acts which one man might regard as the exercise of despotic power might impress another man as being entirely reasonable and proper. The ship-money decrees and the court of star chamber had their honest defenders in the time of Charles I, and there were certainly those, not only in the mother country but in the colonies, who were not shocked at the stamp act or at the principle of taxation without representation. It was not the intention of the framers of the Constitution that the limitations upon legislative power should be left to the forbearance of Congress or to the opinions of executive officers. These limitations were written into the organic law in order that they might not be transcended, and so long as we are to have a government of law and not of men we must look to the written instrument in which the rights of the people are guaranteed and not to the opinions of either legislators or executive officers.

It will hardly be contended that a limitation upon the power of Congress is less binding because it speaks in the language of command rather than in the language of prohibition. The fourth and fifth commandments in the Decalogue are no less binding than the others. The clause of the Constitution which says that all duties, imposts, and excises shall be uniform throughout the United States is as much a limitation upon the power of Congress as if it had been written in the form "no imposts, duties, or excises which are not uniform shall be levied throughout the United States."

There is certainly no more important limitation upon the power of Congress in its relations to all the people than the uniformity clause. Only persons accused of crime are interested in the provision that no ex post facto law shall be passed or that the accused shall enjoy the right to a speedy and public trial and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him and have the assistance of counsel for his defense, and that excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. How many persons are interested in the right of the people to keep and bear arms or to be protected from unreasonable searches and seizures? Only those who go to law, who constitute a very small percentage of our people, are interested in the provision that where the amount in controversy exceeds $20.00 the right of trial by jury shall be preserved in suits at common law.

But all persons are interested in the exercise of the power of taxation. As this court has repeatedly said, the power to tax involves the

power to destroy. When indirect taxes are imposed by levying duties on imports a power is exercised which touches all our people in every part of our territory. The price of nearly every article, not only of luxury but necessity, is in some way affected by the schedule of tariff duties. It is absurd to suppose that our forefathers, who had just emerged from a war the principal cause of which was arbitrary and unjust taxation, were less jealous of the taxing power which they were about to delegate to the Federal Government than of the other powers which they delegated. To what extent they looked forward to a time when there should be Territories under Territorial government, not yet admitted to statehood, it is unnecessary to inquire. The Constitution they made was made for the future, and it is for the court to adjust it and apply it to the conditions that have arisen since the time of its adoption. All that we need contend for here, and all that we insist upon now, is that the uniformity clause as to indirect taxation was made to extend, and was couched in appropriate language to make it extend, to all places under the Government of the United States, and to the same extent that any other limitation written in the Constitution was intended to apply.

VI.

The provision in Section I of the joint resolution annexing the Hawaiian Islands continuing the theretofore existing customs relations of the Hawaiian Islands with the United States and other countries was a clear violation of the uniformity clause of the Constitution.

Section 942 of the civil laws of the Hawaiian Islands in force at the time of the annexation contained the following:

> "There shall be levied, collected, and paid upon all goods, merchandise, and produce imported into this Republic a duty of 5 per cent *ad valorem*, excepting on wines and spirituous liquors, and excepting sugar, molasses, and syrups of sugar, and coffee and rice, the produce of any country with which this government has no existing treaty, which shall be subject to the following rates of duty, namely: * * * Brandy, rum, gin, whiskey, arrack, and all other distilled spirits not exceeding 55 per cent of alcohol, $5.00 per gallon."

Section 943:

> "Whenever the duties specified in this section can be substituted for those provided for in the last preceding section without a violation of any existing treaty between this government and any foreign government, then, in lieu of such duties, there shall be levied, collected, and paid on goods, wares, and merchandise imported from foreign countries the following rates of duty: On alcohol and high wines, $10.00 a gallon; on brandy, gin, rum, whiskey, and all other spirits, etc., * * * containing alcohol or spirits of the strength of 30 per cent or more and not exceeding 50 per cent proof as determined by Trall's hydrometer, $3.50 per gallon; and all exceeding 50 per cent shall pay alcohol duty in proportion to its strength."

The joint resolution of annexation provided that:

> "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by

such treaties as may exist or as may be hereafter concluded between the United States and such foreign nations."

Practically, the effect of this provision of the joint resolution was to make the duty on whiskey and brandy $3.50 a gallon where it did not exceed 50 per cent proof, and if it did exceed 50 per cent proof, at the rate of $10.00 a gallon for the alcohol contained therein. The reciprocity treaty between the United States and the Hawaiian Islands contained no provision for liquors or spirits.

The Dingley tariff act, Schedule H, paragraph 289, imposes a duty on brandy and other spirits manufactured or distilled from grain or other materials, and not specially provided for in this act, $2.25 a proof gallon. A proof gallon is practically a gallon containing about 50 per cent of alcohol.

By comparison of the foregoing provisions it is quite apparent that the effect of the provision in the joint resolution continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries was to permit, or rather to compel, the collection in those islands under the authority of the United States of a duty on brandy and whiskey, whether it came from the United States or from other countries, practically double the duty provided by the Dingley Act to be collected at ports of the United States on brandy and whiskey imported from foreign countries.

A grosser violation of the uniformity clause of the Constitution it would have been difficult to enact. This collection of duties in the Hawaiian Islands, in violation of the Constitution of the United States, continued from July 7th, 1898, until June 14th, 1900, and if the contention of the Government in these cases be correct, it might have been continued for fifty or one hundred years until Congress, the creature of the Constitution, should see fit to extend the Constitution, its creator, to the territory which it had annexed as a part of the United States.

VII.

Even if the Hawaiian Islands could be considered, after annexation, as having been a foreign country, the provision of the joint resolution continuing in force the theretofore existing customs relations with the United States would have been unconstitutional, as violating the provision of subdivision 5, section 9, Article I of the Constitution, that "no tax or duty shall be laid on articles exported from any State."

We have seen that the customs laws of the Hawaiian Islands prior to annexation provided very high duties for whiskey and brandy. Now, after annexation the islands were either a foreign country or they were not a foreign country. If they were not a foreign country, then there was no warrant for taking duties here on articles coming from there under the terms of a tariff act which imposed duties only on articles imported from foreign countries. If they were a foreign country, then the collection there by or under the authority of the United States Government of a tax on whiskey or brandy coming from the United States was a violation of the provision of the Constitution forbidding the levying of a tax on articles exported from any State.

When we annexed these islands we became responsible for their government and control. We are just as responsible for it as we are for

the government of any of our Territories on this continent. If we impose a tax to be collected at Honolulu on whiskey the product of the State of Kentucky, does it make a particle of difference whether we collect the tax in Kentucky when the whiskey is shipped or in Honolulu when it is received? We certainly can not accomplish a result forbidden by the Constitution by adopting one form rather than another. In either case we have collected or instructed or authorized the collection of a tax on the products of a State which have been exported. This the Constitution says we can not do. Has Congress a right to pass an act providing that on all whiskey exported from the State of Kentucky, or on all fruits exported from the State of California there shall be imposed such and such a duty? If it has not a right to do this, has it a right to say that on all whiskey produced in Kentucky and brought into the Territories of Oklahoma or New Mexico there shall be assessed and collected such and such a duty? And, as we have already said, if it has no right to do these things with reference to Oklahoma or New Mexico, where does it get the right to do it for the Hawaiian Islands?

It will be interesting to consider one or two authorities bearing on this question of the right to impose an export tax. The cases to be cited arose under subdivision 2 of the 10th section of the 1st article, which provides that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports," but of course, so far as exports are concerned, subdivision 3, section 9, imposes the same restrictions upon Congress as subdivision 2 of section 10 imposes on the States, and the principles applicable to the one section would be applicable to the other.

The leading authority is the case of *Brown* vs. *State of Maryland* (12 Wheat., 419). The State of Maryland passed an act in which, among other things, it was provided: "And be it enacted that all importers of foreign articles or commodities, or dry goods, wares, or merchandise, by bale, or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The plaintiff in error, Brown, had been indicted for having imported and sold one package of foreign dry goods without a license. He demurred to the indictment. Judgment was rendered against him on the demurrer, from which judgment he had appealed to the Supreme Court of the United States. This court held the law to be unconstitutional and held that there could be no difference between subjecting the importer to a tax (by way of license) and subjecting the importation itself to a tax, and that that which might not be done directly could not be done indirectly. The opinion is by Chief Justice Marshall, and (at page 445) we find the following:

> "In support of the argument that the prohibition ceases the instant the goods are brought into the country a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country; so to import means only to bring them into it. But suppose we

extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose, would Government be permitted to shield itself from the just censure to which this attempt to evade the prohibition of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the Legislature had a right to tax occupations? *Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the Government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country.*"

If it would be an outrage, to quote the expression of Chief Justice Marshall, to station revenue cutters off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United states for foreign countries, would it be any the less an outrage to station Government officers (whether Americans or Hawaiians does not matter) at a place which had been annexed to and made a part of the territory of the United States, there to collect a tax upon the merchandise brought in the vessels? We are unable to see any difference.

The case of Almy vs. State of California, reported in 24 How., 109, is another interesting case on this subject. The State of California had imposed a stamp tax on bills of lading for the transportation from any point or place in that State to any point or place without the State, of gold or silver coin, gold dust, or gold or silver in bars or other form.

The opinion in this case was by Chief Justice Taney, and held the act to be unconstitutional. The court said that the case could not be distinguished from that of Brown vs. Maryland, and continued (page 174):

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. * * * And if the law of California is constitutional then every cargo of every description exported from the United States may be made to pay an export duty to ... e State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States."

These cases are cited upon the proposition upon which many other authorities might be cited, that a thing which the Constitution will not

permit to be done directly can not be done indirectly by disguises or changes of form, and we submit that where the Hawaiian Islands have been annexed to the United States and made a part of its territory, the collection of a tax in those islands, whether it be paid into the treasury of those islands or into that of the United States, is in substance and effect an imposition of an export tax on articles exported from the State, and against this the Constitution contains an express prohibition.

It may be proper in this connection to call attention to the fact that when the recent act establishing the status of Porto Rico was before the Senate, the chairman of the Judiciary Committee of that body, Senator Hoar, called attention to this very objection to the legislation in that case. (See Congressional Record, 56th Congress, 1st session, vol. 33, No. 68, page 2816.)

The supreme court of the Territory of Hawaii rendered a decision on the 9th of October, 1900, holding the Constitution of the United States to have been in force in the islands at least after the 12th day of August, 1898, which opinion, for the information of the court, has been printed as an appendix.

In concluding this brief, we wish to emphasize the fact that the principal, practical question in this case is not what are the rights, immunities, or privileges to which the inhabitants of places acquired by the United States by conquest or cession become entitled *ipso facto* upon the transfer and before Congressional legislation. It is what are the limitations prescribed in the Constitution upon the power of Congress sitting in Washington and legislating with reference to such annexed territory? May Congress in legislating for territory which it has annexed as a part of the territory of the United States disregard the fundamental limitations upon its power written in the organic law to which Congress owes its existence? If it may, the judgment below is correct. If it may not, that judgment can not stand.

VII.

The decision of the circuit court should be reversed and the case should be remanded to the circuit court with instructions to enter a judgment reversing the decision of the Board of General Appraisers, and holding the merchandise in controversy to be exempt from duty.

Dated New York, January 5th, 1900.

CHARLES CURIE,
W. WICKHAM SMITH,
Attorneys for Appellants.
W. WICKHAM SMITH, *Counsel.*

In the supreme court of the Territory of Hawaii. Special term, 1900.

Ex parte EDWARDS.

(Submitted July 9th, 1900. Decided October 9th, 1900.)

Frear, C. J.; Galbraith, J., and Humphreys, circuit judge, in place of Perry, J., absent.

The Congress of the United States by a joint resolution, "To provide for annexing the Hawaiian Islands to the United States," approved

July 7th, A. D. 1898, provided *inter alia* that "the municipal legislation of the Hawaiian Islands * * * not inconsistent with this joint resolution nor contrary to the Constitution of the United States * * * shall remain in force until the Congress of the United States shall otherwise determine." On August 12th, A. D. 1898, there were ceremonial functions held in Honolulu, at which the Hawaiian government was formerly notified by the United States minister plenipotentiary and envoy extraordinary of the adoption and approval of the joint resolution aforesaid and at which the Hawaiian government made an unequivocal transfer and cession of its sovereignty and property. Held—

(1) That by virtue of the language of the joint resolution above quoted all municipal legislation of the Hawaiian Islands contrary to the Constitution of the United States was *ex vi verbae* and not by implication merely, annulled and ceased to be of force or effect after the 12th day of August, A. D. 1898. The question as to whether the joint resolution took effect so as to operate as a repeal of Hawaiian municipal legislation, contrary to the Constitution of the United States, at the date of its approval or on the 12th day of August, A. D. 1898, is one not necessary to the decision of this case.

(2) No person could be put upon trial for an infamous crime in the Hawaiian Islands after August 12th, 1898, without having been first indicted by a grand jury; nor could one be convicted of such crime save by the unanimous verdict of twelve jurors.

(3) Section 616 of the Penal Laws of 1897, providing for the finding of an "indictment" by a circuit judge, and that part of section 1345 of the Civil Laws of 1897 authorizing nine jurors to return a verdict in criminal cases is municipal legislation contrary to the Constitution of the United States, and is null and void.

(4) Sodomy is an "infamous crime" within the meaning of the fifth amendment to the Constitution of the United States.

(5) The petitioner in this case having been put to his trial on the 16th day of August, A. D. 1898, upon an "indictment," so called, found by a circuit judge, charging him with the crime of sodomy, and thereof convicted by a verdict less than unanimous, is entitled to be discharged.

OPINION OF THE COURT BY GALBRAITH, J.

(Frear, C. J., dissenting.)

This was an original proceeding on a writ of *habeas corpus* issued on the petition of George L. Edwards, and the return thereto.

The petitioner was charged on an indictment found by the circuit judge of the first circuit, island of Oahu, Hawaiian Islands, with the offense of an attempt to commit sodomy; was tried and convicted on the 16th day of August, A. D. 1898, by the concurrence of ten of the twelve jurors, and sentenced by the court to imprisonment at hard labor for a term of five years. The return admits that he is now held in the Oahu Prison, Territory of Hawaii, under the commitment issued in pursuance of the conviction and sentence as alleged in the petition.

The indictment against the petitioner was returned under sec. 616 of the Penal Code of 1897 of the Republic of Hawaii, which reads: "The necessary bills of indictment shall be duly prepared by a legal

prosecuting officer and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill."

The provision of the code relative to the verdict of juries reads as follows:

> "SEC. 1345. No jury for the trial of any case, civil or criminal, shall be less than twelve in number, but when nine of the jury shall agree upon a verdict they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve."

It is contended by the petitioner that his indictment, conviction, and sentence were void and his detention is now illegal, in this that he was placed upon trial for an infamous crime without an indictment by a grand jury and was convicted by the minority verdict of a jury, and thus denied the rights and privileges guaranteed him under the 5th and 6th amendments of the Constitution of the United States.

It is contended on behalf of the Territory that the petitioner was legally convicted under the laws of the Republic of Hawaii, that no act of Congress had, at that time, extended the Constitution and laws of the United States to the Hawaiian Islands, and that these amendments, or any other parts of the Constitution of the United States, were not in force on the Hawaiian Islands at the time of his conviction and sentence, to wit, Aug. 16th, 1898.

In passing upon the question raised in this case we can not overlook the history of the long and laborious struggle for the annexation of the Hawaiian Islands to the United States, extending over a period of nearly half a century and ending with the passage of the joint resolution by the United States Congress and its approval by President McKinley on the 7th day of July, A. D. 1898; nor forget the fact that one of the strong arguments for annexation was that American civilization had long been established in these islands and its people and institutions would easily and naturally adapt themselves to and be assimilated with American law and government.

The constitution of the Republic of Hawaii, adopted in 1894, contained this provision: "The President, with the approval of the Cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of America, subject to the ratification of the Senate." (Art. 32.)

A treaty of annexation was negotiated by the representatives of the United States and the Republic of Hawaii in February, 1893, and withdrawn from the consideration of the United States Senate by the President, in March following, and another treaty was made on June 17th, 1897. This last treaty was pending before the United States Senate for ratification when the joint resolution was passed.

This resolution reads in part as follows:

> "JOINT RESOLUTION to provide for annexing the Hawaiian Islands to the United States.
>
> "Whereas the Government of the Republic of Hawaii having, in due form signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United

States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands together with every right and appurtenance thereunto appertaining; Therefore,

"*Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a *part* of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America. * * * The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nation. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." (30 U. S. Statutes at Large, p. 750.)

On the 12th day of August, A. D. 1898, four days prior to the conviction of the petitioner, the ceremonies attending the formal transfer of the sovereignty and public property of the Republic of Hawaii occurred; the Hawaiian flag was lowered from the capitol building and the American flag raised into place. The public property was delivered to and accepted by the representative of the United States.

Prior to the signing of the resolution of annexation the Republic of Hawaii had been an independent sovereignty. She had long occupied a picturesque position among the governments of the world. Although annexation was brought about by the mutual efforts and in compliance with the desire of both Governments, when annexation became an accomplished fact the Republic of Hawaii passed into history; there was no "union" or "marriage," as has been claimed; there was absorption—annihilation. In the language of the resolution "the Hawaiian Islands and their dependencies" were "annexed as a part of the territory of the United States," and at once became "subject to the sovereign dominion thereof."

The joint resolution further provided "until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned."

Chief Justice Taney says on the subject of newly acquired territory: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies, bordering on the United States or at a distance, to be ruled and governed at its own pleasure."

"The power to expand the territory of the United States by the admission of new States is plainly given, and in the construction of this power by all the departments of the Government it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to be admitted.

"It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority.

"A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. * * * *It can not create for itself a new character, separate from the citizens of the United States and the duties it owes them under the Constitution. The territory being a part of the United States, the government and the citizens both enter it under the Constitution*, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property beyond what that instrument confers, *nor lawfully deny any right which it has reserved. * * * It could confer no power on any local government established by its authority to violate the provisions of the Constitution.*" (*Scott* v. *Sandford*, 19 How. U. S., 450–1–2–3.)

"It can not be admitted that the King of Spain (said Justice Daniels) could by treaty or otherwise impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them.

"*Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government*, and not according to those of the government ceding it." (*Pallod's Lessees* v. *Hagan*, 3 How., 225.)

In the license cases, 5 How., 613, Mr. Justice Daniel again said, "Laws of the United States," in order to be binding, must be within the legislative powers vested by the Constitution.

Treaties to be valid must be within the scope of the same powers, for there can be no "authority of the United States" save what is derived mediately, or immediately, and regularly and legitimately from the Constitution."

Chief Justice Marshall, speaking for the Supreme Court of the United States relative to the Territory of Florida acquired by the United States by treaty from the King of Spain, said on the subject of the status of territory ceded by treaty: "The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties. Consequently that Government possesses the power of acquiring territory either by conquest or treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. *If it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed either on terms stipulated in the treaty of cession, or on such as its new master shall impose.*" (*Am. Ins. Co. et al. v. Canter*, 1 Pet., 542.)

There was no "conquest" by force in the annexation of the Hawaiian Islands, nor "holding as conquered territory;" they came to the United States in the same way that Florida did, to wit, by voluntary

cession, and the rule for determining their status is the same. The Hawaiian Islands became a part of the United States on the terms set forth in the joint resolution and on such terms "as its new master might impose;" not one or two years after the resolution was in force and effect, *but at once—immediately.*

The resolution of annexation further provided that "the municipal legislation of the Hawaiian Islands * * * not inconsistent with the joint resolution, nor contrary to the Constitution of the United States shall remain in force until the Congress of the United States shall otherwise determine."

It seems clear from the authorities cited that the Hawaiian Islands were a part of the territory of the United States on the 16th day of August, 1898, as much so as the State of Indiana or the Territory of New Mexico.

Was the Constitution of the United States in force here then, or the 5th and 6th amendments, as claimed for the petitioner?

These amendments are as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." 5th Amend. U. S. Const.
>
> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed (which district shall have been previously ascertained by law) and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence" (6th Amend. U. S. Const.).

The Government of the United States is one of delegated powers. The American Nation, or, in the language of the Constitution, "the people of the United States," is absolutely sovereign. This sovereign has prescribed certain fundamental rules, contained in the Constitution of the United States, which its servants, the President and each member of Congress, must take a solemn oath to support and defend as a condition precedent to taking office. The servants are nowhere authorized to exercise absolute sovereignty, but their powers are limited by the very terms of the Constitution under which they hold their respective offices and discharge their official duties.

Mr. Justice McLean, speaking for the Supreme Court of the United States, said:

> "The Federal Government is one of delegated powers. All powers not delegated to it, or inhibited by it to the States, are reserved to the States, or to the people" (*Briscoe* v. *Bank*, 11 Pet., 317).

Chief Justice Marshall said: "The Government, then, of the United States can claim no powers which are not granted to it by the Consti-

tution; and the powers actually granted must be such as are expressly given, or given by necessary implication" (*Martin* v. *Hunter's Lessee*, 1 Wheat., 326).

Early in the constitutional history of the United States (1820), Chief Justice Marshall, again speaking for the unanimous court on the question as to whether or not the provisions of the Constitution extended to the District of Columbia said as to the meaning of the term "United States:"

> "Does this term designate the whole or any particular part of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia, or the Territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and exercises should be observed in the one than in the other" (*Loughborough* v. *Blake*, 5 Wheat., 317).

This opinion has stood as the decision of the highest court in the land for eighty years.

> "Perhaps the power of governing a Territory belonging to the United States, which has not by becoming a State acquired the means of self government, may result from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whatever may be the source whence the power is derived, the possession of it is unquestioned" (*Am. Ins. Co.* v. *Canter*, 1 Pet., 542).

Again, in the same opinion, the Chief Justice says: "In legislating for them Congress exercises the combined powers of the general and of a State government" (1 Pet., 540).

Chief Justice Waite says in *First Nat. Bank* v. *Yankton*, 101 U. S., 129: "All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States.

"Congress is supreme, and, for the purpose of this department of its governmental authority, has all of the powers of the people of the United States except such as have been expressly or by implication *reversed in the prohibitions of the Constitution.*

"It may do for the Territories what the people under the Constitution may do for the States."

Mr. Justice Curtis, in his dissenting opinion in the Dred Scott case, says on this subject: "If, then, this clause does contain a power to legislate respecting the Territory, what are the limits of the power? To this I answer that in common with all other legislative power of Congress *it finds limits in the express prohibitions on Congress not to do certain things;* that in the exercise of the legislative power Congress can not pass an *ex post facto* law or bill of attainder, and so in respect to each of the *other prohibitions contained in the Constitution*" (19 How., 614–15.)

"The novel doctrine," says Lochren, U. S. district judge for dist. of Minn., "that the power of Congress to govern territory ceded to the United States may be be conferred by a foreign sovereign, by and through the terms of a treaty of cession, and that the General Government can exercise powers thus granted by a foreign sovereign, independent of and in disregard of the Constitution until Congress, mayhap, in the future, shall by its enactment, see fit to extend the Constitution over the Territory, is contrary to the holding of the Supreme Court of the United States above cited, to the effect that the General Government is one of enumerated powers, and can claim and exercise no power not granted to it by the Constitution, either expressly or by necessary implication."

It is clear that the General Government can not legislate over territory where the Constitution from which its every power is derived does not extend. The Constitution must be in force over *territory before the General Government can have any authority to legislate respecting it. No foreign sovereign can invest the General Government with any legislative power.*

"The plain, obvious, and undeniable fact is that the General Government of the United States, created by the Constitution and possessing no vitality or power not directly drawn from that instrument, can only exist and legislate where the Constitution is in force, and that every tract of territory that comes under the sovereignty of the United States comes necessarily under that Constitution which alone gives life to that sovereignty, and beyond which the sovereignty must cease." (*Ex parte Oritz*, 100 F., 961.)

"The first ten amendments to the Constitution of the United States have been called the Federal Bill of Rights. (*Robertson* v. *Baldwin*, 165 U. S., 275.) And it is well understood that none of these amendments were adopted to announce new principles or to declare and define new rights, but were intended to carry forward and reaffirm the rights and privileges of free men, well known and understood by the people who adopted them and whose ancestors had, at great sacrifice, forced their acknowledgment from the hand of unlimited power.

"The Bill of Rights is historically considered the most interesting part of these constitutions, for it is the legitimate child and representative of Magna Charta, and of those other declarations and enactments, down to the Bill of Rights of the act of 1 William and Mary, session 2, by which the liberties of Englishmen have been secured. Most of the thirteen colonies, when they asserted their independence and framed their Constitution, inserted a declaration of the fundamental rights of the people, and the example then set has been followed by the newer States and indeed by the States generally in their most recent constitutions."

* * * "A reason may be found in the remarkable constitutional conservatism of the Americans and their fondness for the enunciation of the general maxims of political freedom." * * * "They are, therefore, it is held, still safeguards against tyranny, and they serve the purpose of solemnly reminding a State legislature and its officers of those fundamental principles which they ought never to overstep." (Bryce, The Amer. Com. (2d ed., 1891), vol. 1, pp. 422–3.)

Mr. Justice Cooley says: "The truth is, the Bills of Rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory, and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law and thus secured against violation." (*Weimer* v. *Bunbury*, 30 Mich., 214.)

Mr. Justice Matthews, speaking for the court, said: "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights."

"*These were limitations upon all the powers of government, legislative as well as executive and judicial.*" (*Hurtado* v. *California*, 110 U. S., pp. 531–2.)

Hon. George F. Edmunds, who is justly regarded as one of the greatest living expounders of the Constitution, said: "But the Constitution as such, I suppose all admit, is not subject to the control of Congress, either to enlarge or diminish, extend or contract, or to be applied to or withdrawn from any people or place. It is not a movable thing, like the Ark of the Covenant of the Israelites, to be set up and moved here or there as the tribes might wander. *It is the actual event and condition* and *not the legislative or executive will that must, in the nature of things, determine the status of a man or a country under it.*

"The instances in which Congress has declared in statutes organizing Territories that the Constitution and laws should be in force, there are no evidence that the Constitution and laws were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases they declare a preexisting truth to ease the doubts of casuists." (Letter to Senator Proctor, dated March 21st, 1900, and published in Congressional Record, March 30th, 1900, p. 3737.)

"We can not assent to the doctrine that the operation of the Constitution in the Territories belonging to the United States depends upon the will or action of Congress extending it there. This doctrine necessarily carries with it the admission that what one Congress can give the same or a succeeding Congress can take away; that although Congress by the organic act organizing the Territory of Hawaii extended the Constitution and laws of the United States to this Territory, the next Congress might repeal that part of the organic act, and that then the people of this Territory would have none of the guarantees of life, liberty, and property provided in the Constitution and might thereafter be governed as a province, a crown colony, or in any manner that Congress in its wisdom, or unwisdom, might provide; that a tariff might be levied on the products of the islands going into the States, and citizens of his Territory might be denied the rights and privileges of citizens of the United States residing in other parts of its imperial domain.

"From the above citation of authorities we reach the conclusion that those negative provisions of the Constitution, adopted to declare and protect the life, liberty, and property of the citizens were in force in the Hawaiian Islands as soon as the same became

a part of the United States territory and subject to the 'sovereign dominion thereof.' It is not necessary in order to decide the case at bar to express an opinion as to whether the Constitution *ex proprio vigore*, and as a whole, extends to and is in force in all territory subject to the sovereignty of the United States. It is clear and well settled that some of the provisions of the Constitution do not apply to the Territories, whether there is an act of Congress expressly extending them there or not, for the reason that they are totally inapplicable to the conditions existing in the Territories. However, the ablest and most earnest advocates of the unlimited power of Congress to legislate for the Territories, unrestricted by the provisions of the Constitution, frankly admit that those negative provisions of the Constitution inserted to protect the life and property of the citizen are in force in the Territories and are so far a limitation on the power of Congress in legislating for the Territories.

"It may be admitted," says Townsend, U. S. district judge of southern district of New York, "that the constitutional guarantees of civil rights would apply to the territory under the sovereignty but not a part of the United States. Certain civil rights which we believe belong to everyone *are crystallized into the negative provisions of our Constitution* in order to prevent any wrongful and improper use of our power, and *these may be held to control our power wherever it reaches. These considerations may be found to limit us in governing any territory.*" (*Goetze* v. *United States*, 103 Fed. Rep., p. 85.)

That some of those "negative provisions" are contained in the fifth and sixth amendments to the Constitution no one will deny, and it is equally clear to us that these were in force in the Hawaiian Islands on the 16th day of August, 1898, at the time of the trial and conviction of the petitioner.

Was the petitioner then denied any of the rights and privileges guaranteed thereby? That he was tried and convicted of an "infamous crime" no citation of authorities will be necessary to establish.

The question is not whether an indictment found by the circuit judge as provided by the laws of the Republic of Hawaii is as good a protection to the life and liberty of the citizen as one presented by a grand jury, but it is whether or not the fifth amendment requires or guarantees to the citizen that he shall not be placed on trial for an infamous crime without an indictment by a grand jury.

Mr. Justice Gray said: "But if the crime of which the petitioner was accused was an infamous crime, within the meaning of the fifth amendment of the Constitution, no court of the United States had jurisdiction to try to punish him, except upon presentment or indictment by a grand jury. (*Ex parte Wilson*, 110 U. S., 442.)

The reason why a person so accused can not be tried or punished in any "court of the United States" and may be in a State court, is that the Federal bill of rights, or first ten amendments to the Constitution, do not apply to the people of the States in making their State constitutions nor to the State legislatures in legislating for the States. But it is well settled that Congress in legislating for the Territories is bound by these amendments. It can not be seriously contended that Congress intended by the joint resolution of annexation, or did it in fact authorize the courts of the Hawaiian Islands to do what the

courts of no other Territory of the United States could do. After annexation the courts of the Hawaiian Islands exercised all their power and authority under the joint resolution and by direction of the President of the United States, and we may observe in this connection that the judges of the courts were required and did in fact take an oath to support the Constitution of the United States.

Mr. Justice Gray further said in case last cited, "that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court. The question is whether the crime is one for which the statute authorizes the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put on trial except upon the accusation of a grand jury." * * * "But the Constitution protecting everyone from being prosecuted without the intervention of a grand jury for any crime which is subject by law to an infamous punishment, *no declaration of Congress is needed to secure or competent to defeat the constitutional safeguard.*" (*Ex parte Wilson*, 110 U. S., p. 426.)

Mr. Justice Harlan, in *Thompson* v. *Utah* (170 U. S., 346), says: "That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question."

Citing *Webster* v. *Reid* (11 How., 437, 460); *Am. Pub. Co.* v. *Fisher* (166 U. S., 464, 468); *Springville* v. *Thomas* (166 U. S., 70–77).

> "In the last-named case it was claimed that the Territorial legislature of Utah was empowered by the organic act of the Territory of Sept. 9th, 1850 (9 U. S. St. L., 453, c. 57, par. 6), to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. That court said: 'In our opinion the seventh amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule and could not be treated as attempting to do so. It is equally beyond question that the provisions of the national Constitution relating to trial by jury for crimes and to criminal prosecutions apply to the Territories of the United States' (170 U. S., pp. 346, 347.)
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> "Assuming that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more or less. (2 Hales P. C., 161; Chitty's Cr. Law, 505.) This question must be answered in the affirmative." (*Thompson* v. *Utah*, 170 U. S., p. 349.)

It will be remembered that Thompson was placed upon trial, after the admission of Utah as a State, for a felony committed when Utah was a Territory, and under the State constitution eight persons composed a lawful trial jury, and such a jury tried and found Thompson guilty. In the opinion last cited the court further says: "Was it then competent for the State of Utah, upon its admission to the Union, to

do in respect to Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons? We are of opinion that the State did not acquire upon its admission into the Union the power to provide in respect to felonies committed within its limits while it was a Territory that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a State could deprive him of his liberty by the concurrent action of a court and eight jurors would recognize the power of the State not only to do what the United States in respect to Thompson's crime could not at any time have done by legislation, but to take from the accused a substantial right belonging to him when offense was committed." (*Thompson* v. *Utah*, 170 U. S., pp. 350–351.)

> "It follows that all the provisions of the Constitution in respect to personal and property rights, including the right to trial by jury in criminal prosecutions, became at once, when the cession was completed, a part of the supreme law of the land. The character of an offense and the measure of its punishment would be determined by the law in force when and where the act was committed; the laws of that character remain in force after the cession until changed; but *the manner of the trial must depend on the law in force when the trial is had, even though the establishment and organization of courts must be awaited before the trial can be had.*" (*Ex parte Ortiz*, 100 Fed., p. 962.)

Does this construction of the law mean, as has been so earnestly contended, that criminals should, of necessity, go unpunished, and that there was no protection to life and property on the Hawaiian Islands between the 7th day of July, 1898, the date of signing the joint resolution, and the 14th day of June, 1900, the date the organic act went into effect? Certainly not. During all of this period there was organized government here; there were officers and courts, legally constituted, continued in office and existence by the order of President McKinley, under the authority given in the joint resolution. There was the great body of the municipal laws of the late Republic "not inconsistent with the resolution, not contrary to the Constitution of the United States," continued in force until Congress should otherwise direct. There was provision for a trial jury of twelve, and that part of the statute authorizing nine jurors to return a verdict could have been controlled by a simple direction or instruction of the trial court that there must be a unanimous verdict to convict, and those additional safeguards to the life, liberty, and property of the citizen prescribed by the Constitution of the United States were here in full force and vigor.

Among the municipal laws of the Republic of Hawaii continued in force was sec. 1109 of the civil laws, which provide that the common law of England, as ascertained by English and American decisions, is declared to be the common law of the Hawaiian Islands, except when changed by decision, usage, or law. The circuit court of the first circuit was a court of record and of common-law jurisdiction, and on August 16th, 1898, had the undoubted power to issue an open venire

and summons and empanel a grand jury in the manner provided by the rules of common law.

> As Justice Cooley said: "They assume that the existing principles of the common law are ample for the protection of individual rights when once incorporated in the fundamental law and thus secured against violation." (*Weimer* v. *Banbury*, Mich., 214.)

Chief Justice Marshall, speaking of the authority of courts to issue an open venire, in the absence of any statute authorizing it, and of the law at that time, said: "It has been justly observed that no act of Congress directs grand juries or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers?

"The answer is, that the laws of the United States have erected courts which are vested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indisputable implication.

"But how far is this implication necessary and indisputable? The answer is obvious. Its necessity is coextensive with the jurisdiction to which it is essential." (*United States* v. *Hill*, 1 Brock., 159.)

In *Clawson* v. *United States*, 114 U. S., 486, in approving the action of the supreme court of Utah, whose opinion sustained the action of a district court of the Territory in issuing an open venire for jurors and who based its judgment, not on any statute authorizing it, but the fact that such "power was inherent in the court and was not forbidden by any statute in force in Utah," said: "We concur in this view, so far as the resort to the open venire, after the exhaustion of the two hundred names is concerned."

The following authorities also support this proposition: 1 Chitty, Crim. Law, 518; 2 Hale, P. C., 265; *Mackay* v. *People* (2 Cal., 13); *Wilburn* v. *State* (21 Ark., 198, 201); *Goodwin* v. *United States* (54 Pac., 432).

Deciding only the questions presented by the case at bar, we hold that the Hawaiian Islands were a part of the United States on the 16th day of August, A. D. 1898; that the fifth and sixth amendments to the Constitution of the United States were in force here at that time; that the petitioner having been put to his trial on the 16th day of August, A. D. 1898, upon an "indictment" found by a circuit judge, charging him with an infamous crime, and thereof convicted by a verdict of ten jurors, was thereby deprived of his constitutional rights, and his detention is illegal.

Let the writ issue and the petitioner be discharged.

DAVIS AND GEAR, *attorneys for the petitioner.*

Hon. E. P. DOLE, Attorney-General, opposing.